

SECURITY AND FREEDOM ENHANCEMENT (SAFE) ACT OF 2005

The Security and Freedom Enhancement (SAFE) Act is a narrowly-tailored bipartisan bill that would revise several provisions of the USA PATRIOT Act. It would retain all of the expanded authorities created by the PATRIOT Act but place important limits on these authorities. It would protect the constitutional rights of American citizens while preserving the powers law enforcement needs to fight terrorism.

Section 1 – Short Title

Section 2 – FISA Roving Wiretaps (Section 206 of the PATRIOT Act)

The SAFE Act would retain the PATRIOT Act's authorization of roving wiretaps and "John Doe" wiretaps under the Foreign Intelligence Surveillance Act (FISA), but would eliminate "John Doe" roving wiretaps, a sweeping power never before authorized by Congress. A "John Doe" roving wiretap does not identify the person or the phone to be wiretapped. The SAFE Act would also require law enforcement to ascertain the presence of the target of the wiretap before beginning surveillance. This would protect innocent Americans from unnecessary surveillance.

Section 3 – "Sneak & Peek" Searches (Section 213)

The SAFE Act would retain the PATRIOT Act's authorization of delayed notification or "sneak and peek" searches when one of an enumerated list of specific, compelling reasons to delay notice is satisfied. However, it would eliminate the catch-all provision that allows sneak and peek searches in any circumstances seriously jeopardizing an investigation or unduly delaying a trial. The SAFE Act would require notification of a covert search within seven days, instead of the undefined delay that is currently permitted by the PATRIOT Act. A court could allow unlimited additional 21-day delays of notice in specific, compelling circumstances.

Section 4 – FISA Orders for Library and Other Personal Records (Section 215)

The SAFE Act would retain the PATRIOT Act's expansion of the FISA records provision, which allowed the FBI to obtain "any tangible things" from any entity. However, it would restore a standard of individualized suspicion for obtaining a FISA order and create procedural protections to prevent abuses. The government would be able to obtain an order if they could show facts indicating a reason to believe the tangible things sought relate to a suspected terrorist or spy. As is required for grand jury subpoenas, the SAFE Act would give the recipient of a FISA order the right to challenge the order, require a showing by the government that a gag order is necessary, place a time limit on the gag order (which could be extended by the court), and give a recipient the right to challenge the gag order. The SAFE Act would require notice to the target of a FISA order if the government seeks to use the things obtained from the order in a subsequent proceeding, and give the target an opportunity to challenge the use of those things. Such notice and challenge provisions are required for other FISA authorities (wiretaps, physical searches, pen registers, and trap and trace devices).

Section 5 – National Security Letters (Section 505)

The SAFE Act would restore a standard of individualized suspicion for using an NSL, requiring that the government have reason to believe the records sought relate to a suspected terrorist or spy. As is the case for grand jury subpoenas, the SAFE Act would give the recipient of an NSL the right to challenge the letter and the nondisclosure requirement, and place a time limit on the nondisclosure requirement (which could be extended by the court). As is the case for FISA authorities, the SAFE Act would give notice to the target of an NSL if the government seeks to use the records obtained from the NSL in a subsequent proceeding, and give the target an opportunity to challenge the use of those records.

Section 6 – Pen Registers and Trap and Trace Devices (Section 216)

The SAFE Act would retain the PATRIOT Act's expansion of the pen/trap authority to electronic communications. In recognition of the vast amount of sensitive information that law enforcement can now access, the SAFE Act would create modest safeguards allowing increased Congressional, public, and judicial oversight of pen/trap usage. The SAFE Act would require additional Congressional reporting, require delayed notice to individuals who are targets of pen/traps (pen/trap targets currently receive no notice, unlike the targets of wiretaps), and slightly raise the burden of proof for obtaining pen/trap orders. Under the current standard, the government need only certify that the information sought is relevant, a certification that a judge has no power to question. Under the revised standard, the government would have show to facts indicating a reason to believe that the information sought is relevant.

Section 7 – Domestic Terrorism Definition (Section 802)

The PATRIOT Act's overbroad definition of domestic terrorism could include acts of civil disobedience by political organizations. While civil disobedience is and should be illegal, it is not necessarily terrorism. The SAFE Act would limit the qualifying offenses for domestic terrorism to those that constitute a federal crime of terrorism, instead of any federal or state crime, as is currently the case.

Section 8 – FISA Public Reporting

The PATRIOT Act made it much easier for law enforcement to use FISA to conduct secret surveillance on American citizens regardless of whether they are suspected of involvement in terrorism or espionage and whether the primary purpose of the underlying investigation is intelligence gathering. In 2003, the most recent year for which statistics are available, the number of FISA wiretaps exceeded the number of criminal wiretaps for the first time since FISA became law. It is important for Congress and the American people to learn more about how the FBI is using FISA since the passage of the PATRIOT Act. Therefore, the SAFE Act would require increased public reporting on the use of FISA.